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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

No. _____

PAUL E. ROBINSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether evidence of uncharged misconduct is automatically admissible under Federal Rule of Evidence 404(b) to prove intent when intent is an element of the crime charged but is not a disputed factual issue.

II. Whether the application of Guideline Section 3B1.1 to sentence an individual to an additional period of incarceration based upon the finding by a preponderance of the evidence that he was an organizer or leader of criminal activity violates that individual's rights to due process under the Fifth Amendment.

LIST OF ALL PARTIES TO THE PROCEEDINGS

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Seventh Circuit, whose judgment is sought to be reviewed in this case:

The United States Government

Paul E. Robinson

Daniel W. Robinson

Dillard W. Woods

Edward Alvarez and

Serafin Hernandez*

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* Mr. Alvarez and Mr. Hernandez were not tried together with Mr. Robinson.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Paul E. Robinson, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 27, 1992.

OPINIONS BELOW

The opinion of the court of appeals, *United States v. Robinson*, Nos. 89-3680, 89-3687, and 89-3626 (7th Cir. Feb. 27, 1992), is unpublished and is reproduced in the Appendix at 1a-44a.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. Mr. Robinson timely filed a petition for rehearing with suggestion for rehearing en banc which was denied on April 24, 1992. (App. at 46a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put

in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 404 of the Federal Rules of Evidence provides, in pertinent part:

(b) **Other crimes, wrongs or acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Section 3B1.1 of the United States Sentencing Commission Sentencing Guidelines provides:

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor, in any criminal activity other than described in (a) or (b), increase by 2 levels.

STATEMENT OF THE CASE

On May 17, 1989, the petitioner, Paul E. Robinson, was charged, together with Daniel W. Robinson, Dillard W. Woods, Edward Alvarez and Serafin Hernandez in a four count superseding indictment returned in the United States District Court for the Southern District of Illinois.[1] Count 1 charged that from "in or about approximately 1988, and continuing thereafter, up to and including in or about May of 1988," Paul Robinson and the other defendants conspired to distribute and possess with intent to distribute five (5) kilograms or more of cocaine in violation of 21 U.S.C. § 846. (App. 2a - 3a).[2] Over Petitioner's

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[1] The original indictment was returned on April 18, 1988.

[2] Counts 2 and 3 charged that on or about March 14, 1988 and on or about April 12, 1988, Paul Robinson and the other defendants possessed with intent to distribute five (5) kilograms or more of cocaine in violation of 21 U.S.C. §

strenuous objection, during trial, the Government's two principal witnesses testified that Paul Robinson directed a marijuana importation and distribution operation during the 1970's that transported large amounts of marijuana from Florida to the St. Louis area.

The district court admitted the marijuana conspiracy evidence under Rule 404(b) of the Federal Rules of Evidence to establish, inter alia, petitioner's intent with respect to the charged crime and so instructed the jury.[3]

841(a)(1) and 18 U.S.C. § 2. Count 4 charged that on or about March 13-14, 1988, Paul Robinson and the other defendants aided and abetted or caused interstate travel to facilitate unlawful activity in violation of 21 U.S.C. §§ 841(a)(1) and 856 and 18 U.S.C. §§ 1952.

[3] The district court instructed the jury that it could consider the evidence of petitioner's participation in the marijuana smuggling and distribution on the issues of plan, preparation, knowledge and intent.

The district court sentenced Mr. Robinson to a total of 360 months imprisonment after applying Guideline Section 3B1.1(a) and finding by a preponderance of the evidence that Mr. Robinson was an organizer or leader of criminal activity involving five or more persons.

On appeal, the Seventh Circuit applied its rule that where specific intent is an element of the crime charged, evidence of other acts may be introduced to establish that intent even if intent is undisputed by the defendant. (App. at 30a).

The Court of Appeals therefore concluded that the marijuana evidence was directed toward establishing a matter in issue other then the defendant's propensity to commit

the crime charged.[4]

On appeal, petitioner also challenged the application of Sentencing Guideline 3B1.1(a) to increase his sentence four levels for being an organizer or leader of criminal activity without proof of that fact beyond a reasonable doubt as a violation of his rights to due process under the Fifth Amendment.

The application of this guideline raised petitioner's offense level from 36 to 40 and therefore required the court to add to his sentence, increasing it from a possible 19 to 24 years to a range of 30 years to life.

The Seventh Circuit did not address Mr. Robinson's constitutional arguments with respect to the manner in which this

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[4] The Court of Appeals applied a four part test governing the admission of uncharged criminal conduct citing *United States v. Lennartz*, 948 F.2d 363, 366 (7th Cir. 1991). (App. at 29a).

guideline was applied.

REASONS FOR GRANTING THE WRIT

I. THE SEVENTH CIRCUIT'S RULE THAT, WHERE THE CRIME INCLUDES SPECIFIC INTENT AS AN ELEMENT, OTHER-CRIMES EVIDENCE IS ADMISSIBLE UNDER RULE 404(b) EVEN THOUGH INTENT IS NOT IN DISPUTE IS IN DIRECT CONFLICT WITH THE RULE FOLLOWED IN OTHER CIRCUIT COURTS OF APPEAL AND IS INCOMPATIBLE WITH IMPORTANT CONSTITUTIONAL AND PUBLIC POLICY CONSIDERATIONS.

A. The Conflict in the Circuits

Federal Rule of Evidence 404(b) deals with a specific aspect of the general rule of forbidding character evidence to establish a criminal defendant's propensity to act in a given manner:

> Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

Rule 404(b), Fed.R.Evid.

A conflict has arisen between the circuits over the admissibility of other-

crimes evidence pursuant to Rule 404(b) where specific intent is an element of the crime charged but is not in dispute in the case at bar.

The Second, Fifth and Sixth Circuits have held flatly that other-crimes evidence is inadmissible on the issue of intent **unless** it is actually in dispute. See, e.g., *United States v. Manafzadeh*, 592 F.2d 81, 87 (2d Cir. 1979); *United States v. O'Connor*, 580 F.2d 38, 40 (2d Cir. 1978); *United States v. Williams*, 577 F.2d 188, 191 (2d Cir.), *cert. denied*, 439 U.S. 868 (1978)[5]; *United States v. Beechum*, 582 F.2d

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[5] A panel of the Second Circuit has apparently softened the bright line rule articulated in its previous decisions. In *United States v. Ortiz*, 857 F.2d 900 (2d Cir. 1988), *cert. denied*, 489 U.S. 1070 (1989), the Court held that a defendant may preclude admission of other act evidence on the issue of intent by expressing a decision not to dispute that issue with sufficient clarity so that the court will be justified: (1) in sustaining an objection to any cross-examination or jury argument that raises the issue; and (2) in instructing the jury that

998, 900 (5th Cir. 1978) (en banc), *cert denied*, 440 U.S. 920 (1974); *United States v. Ring*, 513 F.2d 1001, 1009 (6th Cir. 1975).

In sharp contrast, the Seventh, Eighth, and Ninth circuits have held that, even if intent is not seriously disputed by the defendant, in those instances where specific intent is an essential element of the crime charged, other-crimes evidence relevant to proof of intent is automatically admissible unless it fails to meet the standards of Rule 403 of the Federal Rules of Evidence. See, e.g., *United States v. Chaimson*, 760 F.2d 798, 808 (7th Cir. 1985); *United States v. Adams*, 898 F.2d 1310, 1312, (8th Cir. 1989); *United States v. Ayers*, 924 F.2d

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if they find all the other elements established beyond a reasonable doubt, then they must find against the defendant because intent is not in dispute. Id. at 904.

1468, 1473, (9th Cir. 1991).

Other circuits take a middle ground with the adoption of a rule that requires a defendant to take some affirmative action to withdraw the issue of his or her intent from the case before other crimes evidence is excluded as irrelevant.

In *United States v. Hernandez*, 896 F.2d 513 (11th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 159 (1990), the Eleventh Circuit held that intent is a material issue in a conspiracy case unless the defendant affirmatively withdraws that issue from the case. Id. at 522. The Fifth Circuit in *United States v. Ferrer-Cruz*, 899 F.2d 135 (1st Cir. 1990) held that while the defendant's failure to argue lack of intent does not remove the issue, a defendant may remove intent as an issue by telling the court with sufficient clarity that he will not dispute that issue.

B. The Rigid Consequences of the Seventh Circuit's Rule: Talismanic Analysis With No Relation to Logic

The Seventh Circuit takes a rigid approach in which evidence of other crimes is automatically admissible on the issue of intent, subject only to the provisions of Rule 403 of the Federal Rules of Evidence.

> Our analysis indicates that when the crime charged is one requiring a showing of specific intent, "intent" need not be disputed by the defendant before Rule 404(b) evidence can be introduced. In specific intent crimes, intent is an essential and material element to be proven, and thus necessarily becomes a matter in issue.

United States v. Harrod, 856 F.2d 996, 1000 (7th Cir. 1988).

Relevance to a matter in issue is fundamental to any logical examination of the admissibility of other crimes evidence. As Chief Justice Rehnquist wrote in *Huddleston v. United States*, "[e]vidence is

admissible only if it is relevant. 'Relevance is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.'" 485 U.S. 681, 689 (1988) (quoting Advisory Committee's Notes on Fed.R.Evid. 401, 28 U.S.C. App. at 688).

The result of the bright-line rule adopted by the Seventh Circuit is that it makes relevance an inherent characteristic of other-crimes conduct whenever a specific intent crime is charged. No evidence has relevance as an inherent characteristic -- relevance is not automatic. As Judge Cudahy wrote in his concurring opinion in *Chaimson*:

> [T]he rules should not be so understood as to make the admissibility of other-crimes evidence automatic where the crime is one of specific intent . . . . such evidence is only admissible if it is really introduced to show intent. The government . . . cannot simply flood the courtroom with other-crimes evidence on the grounds that the crime was one of specific intent.

760 F.2d at 813 (Cudahy, J. concurring). (emphasis in original).

Courts have long recognized the special dangers posed by other-crimes evidence. Patterson, Evidence of Prior Bad Acts: Admissibility Under the Federal Rules, 38 Baylor L.Rev. 331, 333 (1986), at 333. The likelihood of prejudice is extreme. "[E]manations from evidence of a defendant's bad acts are almost always suggestive of a defendant's propensity to commit other bad or criminal acts and tend to impugn his or her credibility." *United States v. Shackleford*, 738 F.2d 776, 779 (7th Cir. 1984).

Jurors may return a verdict of guilty for reasons other than finding all the elements of the alleged crime beyond a reasonable doubt. Alternatively, a jury may conclude that the accused, having committed other crimes or wrongs, is a "bad" person

who deserves punishment and incarceration even though reasonable doubt exits with respect to the crime charged. Patterson, Evidence of Prior Bad Acts; supra, at 332.

As part of the Chicago Jury Project, researchers found that conviction rates were significantly greater after a jury learned that the defendant had a criminal record or had been charged even with a minor crime. E. Imwinkelried, The Need to Amend Federal Rule of Evidence 404(b): The Threat to the Future of the Federal Rules of Evidence, 30 Villanova L. Rev. 1465, 1487 (1985).

Such results are impermissible in our system of justice where there is a legal presumption of innocence until proven guilty beyond a reasonable doubt. *Michelson* v. United States, 335 U.S. at 469, 476-477 (1948).

In the instant case, highly

prejudicial evidence of Mr. Robinson's role in a dissimilar and distinct marijuana smuggling and distribution operation was found to be automatically directed towards a matter in issue other than his propensity to commit the charged crime **solely** because his specific intent was an element of the offense. (App. at 30a). The mere fact that a crime includes specific intent as an element does not put that matter in issue. The Seventh Circuit has carved out an exception for specific intent offenses that has effectively swallowed the rule that other crimes evidence is not admissible on the issue of intent unless intent is disputed or called into question. *United States v. Kramer*, 955 F.2d 479, 492 (7th Cir. 1992) (Cudahy, J. concurring).

This "automatically in issue" exception threatens to destroy the viability of Rule 404(b). Intent is commonly in issue

as an essential element of a crime. If the mere existence of this element justifies the admission of other-crimes evidence, the general bar against propensity evidence has been destroyed. *United States v. Oppon*, 863 F.2d 141, 149 (1st Cir. 1988) (Coffin, J. concurring) (emphasis added).

The Seventh Circuit's "automatically in issue" rule worked to petitioner's extreme disadvantage in that he could not take any measures that might have removed that issue from contention and thus precluded admission of the devastating prior crimes evidence. Such would not have been the case in other circuits. See supra at 11, 13. The circuits are in clear conflict on this question and it is one that will recur in many cases. Accordingly, the issue presented is one which calls out for uniform treatment in the federal courts -- a result that only this court can achieve.

For all these reasons, petitioners respectfully request this court to grant his petition for certiorari and resolve this conflict among the courts of appeal.

II. THE APPLICATION OF SENTENCING GUIDELINE 3B1.1(a) TO ENHANCE A DEFENDANT'S SENTENCE ON THE BASIS THAT THE DEFENDANT WAS AN ORGANIZER OR LEADER OF A CRIMINAL ACTIVITY WITHOUT PROOF OF THAT FACT BEYOND A REASONABLE DOUBT IS IN CONFLICT WITH DUE PROCESS PRINCIPLES ARTICULATED IN *IN RE WINSHIP*, 397 U.S. 357 (1970), *MULLANEY V. WILBUR*, 421 U.S. 684 (1975) AND THEIR PROGENY

A. Winship, Mullaney, Patterson & McMillan

The Fifth Amendment to the United States Constitution provides, in part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. art. V.

This Court has made abundantly clear that due process under the Fifth Amendment includes the reasonable-doubt standard of proof as the bedrock of the American criminal justice system. In *In Re*

Winship, 397 U.S. 357 (1970), the Court wrote:

> The standard provides concrete substance for the presumption of innocence - that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

Id. at 363.

Proof beyond a reasonable doubt dates from the early days of our nation and reflects a profound judgment about the way the law should be enforced and justice administered. Id. at 362, 363. *Winship* held that the Due Process Clause protects an accused against conviction and punishment except by proof beyond a reasonable doubt of all facts necessary to constitute the crime for which punishment is imposed. Id. at 364.

In *Mullaney v. Wilbur*, 421 U.S. 684 (1975), the State of Maine contended that because the issue in question did not arise

until the fact finder had reached a conclusion that the defendant was guilty of at least manslaughter, the defendant's "critical interests in liberty and reputation are no longer of concern since irrespective of the presence or absence of this factor he was likely to lose his liberty and certain to be stigmatized." Id. at 697-98. In response, the Court made it clear that whenever a statutory scheme concerned itself with not only guilt or innocence, but also with the degree of criminal culpability, the fact upon which the higher degree of culpability turned must be established beyond a reasonable doubt. Id. at 698.

This Court has since refined the principles adopted in *Winship* and *Mullaney*. In *McMillan v. Pennsylvania*, 477 U.S. 85 (1986), the Court noted that "the reasonable doubt standard has always been dependent

upon how a state defines the offense . . . but there are constitutional limits to the State's power in this regard; in certain limited circumstances *Winship's* reasonable-doubt requirement applies to facts not formally identified as elements of the offense charged." Id. at 85, 86 (citing *Patterson v. New York*, 432 U.S. 197, 211, n. 12 (1977)).

In *McMillan*, the court upheld a Pennsylvania statute which provided that anyone convicted of certain felonies would be subject to a minimum five year sentence if the sentencing judge concluded, by a preponderance of the evidence, that the defendant "'visibly possessed a firearm' during commission of the offense." Id. at 81. The Court made clear that Pennsylvania's statute was not unconstitutional because it

> neither alters the maximum penalty for the crime committed nor creates

> a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it. . . .

Id. at 89.

Moreover, the determination upon which the minimum five year sentence rested was never specifically segregated from other elements of a judges' sentencing discretion for the purpose of establishing a fixed or "add on" sentence. The statute merely required that where this factor was found to co-exist with the charged elements of the felonies to which it applied, the weight to be given to all the sentencing factors to be considered is not to be less than a five year term. Id. at 88. "The Pennsylvania Legislature did not change the definition of any existing offense. It simply took one factor that has always been considered by sentencing courts to bear on punishment -

the instrumentality used in committing a violent felony - and indicated the precise weight to be given that factor if the instrumentality is a firearm." Id. at 89-90.

Chief Justice Rehnquist noted that the Court had never attempted to define precisely the constitutional limits noted in *Patterson* and declined to do so in the context of *McMillan* since the Court was persuaded that the Pennsylvania law did not exceed those limits. Id. at 87.

While the Court held in *McMillan* that in the limited circumstances pertaining to the Pennsylvania statute, a preponderance of the evidence standard satisfied due process, this Court has never considered due process requirements for sentencing guidelines such as 3B1.1(a).

Nevertheless, citing *McMillan*, the Seventh Circuit has held that proof of sentencing factors under the Sentencing

Guidelines by the preponderance of the evidence satisfies due process. *United States v. Ross*, 905 F.2d 1051,1054 (7th Cir. 1990).

Other circuits have made similar holdings. *United States v. Blanco*, 888 F.2d 907 (1st Cir. 1989); *United States v. Guerra*, 888 F.2d 247 (2d Cir. 1989), *cert. denied*, 494 U.S. 1090 (1990); *United States v. McDowell*, 888 F.2d 285 (3rd Cir. 1989); *United States V. Urrego-Llinares*, 879 F.2d 1234 (4th Cir.), *cert. denied*, ___ U.S. ___, 110 S.Ct. 346 (1989); *United States v. Castro*, 908 F.2d 85 (6th Cir. 1990); *United States v. Barnerd*, 887 F.2d 841 (8th Cir. 1989); *U.S. v. Rafferty*, 911 F.2d 227 (9th Cir. 1990); *United States v. Matthews*, 942 F.2d 779 (10th Cir. 1991); *United States v. Terzado-Madruga*, 888 F.2d 1099 (11th Cir. 1990); *United States v. Burke*, 888 F.2d 862 (D.C.Cir. 1989).

McMillan, however, does not give carte blanche to the principle that proof of any sentencing guideline enhancement factor by a preponderance of the evidence satisfies due process. The Pennsylvania statute was not "tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." 477 U.S. at 88. Chief Justice Rehnquist indicates the "inability to lay down any 'bright line test'" stating that "the law is full of situations in which differences of degree produce different results." Id. at 91.[6]

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[6] See also *United States v. Kikumura*, 918 F.2d 1084 (3rd Cir. 1990). The Court of Appeals held that a preponderance of the evidence standard was sufficient for most pertinent sentencing factors, a court should not "reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations" in those situations where the sentencing provision is "the tail that wags the dog."

Sentencing Guideline 3B1.1(a) is not similar to Pennsylvania's statute, and the degree of difference dictates different results. For the following reasons, the result due process compels is to require the government to establish the aggravating role beyond a reasonable doubt.

B. Sentencing Guideline 3B1.1(a) is not Merely a Sentencing Enhancement Factor Which Co-Exists With the Charged Elements of the Felonies to Which it Applies

Unlike the Pennsylvania statute, Sentencing Guideline 3B1.1(a) is not merely a sentencing enhancement factor which co-exists with the charged elements of the felonies to which it applies. Id. at 89. The federal sentencing guidelines are not mere flexible guideposts for use in the exercise of discretion. *Miller v. Florida*, 482 U.S. 423 (1987).[7] The guidelines are

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[7] In a recent case, *U.S. v. Bell*, 789 F.Supp. 413, 420 (N.D. Iowa 1992), a district court, utilizing the analytical framework of *Miller v. Florida*, 482 U.S. 423

not guidelines at all, but instead dictate mandatory sentencing ranges for all federal crimes, replacing the statutory framework that previously controlled a defendant's sentence.

Unlike the Pennsylvania statute in *McMillan*, Section 3B1.1(a) is derived from a statutorily created crime, 21 U.S.C. Section 848, the continuing criminal enterprise (CCE) offense. Both the language of the enabling statute, 28 U.S.C. § 994(i), and the guideline itself articulate essentially the same description of leadership as does the language of 21 U.S.C. § 848(d) which created the crime of operating a continuing criminal enterprise.

(1987) held that the federal sentencing guidelines are laws for the purposes of the Ex Post Facto Clause.

Under Section 848(d) a person is engaged in a CCE if:

> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter - **(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management**, and (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(d)(1) (emphasis supplied).

Congress, in 28 U.S.C. § 994(i) directs the Commission to assure that the guideline specify a sentence to a "substantial" term of imprisonment where the defendant

> (3) committed the offense in furtherance of a conspiracy with three or more persons engaging in a pattern of racketeering in which the defendant participated in a managerial or supervisory capacity.

28 U.S.C. § 994(i)(3).

The Sentencing Commission

translated this directive into Section 3B1.1 which provides that a defendant's offense level shall be increased

> (a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.
>
> (b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.
>
> (c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described above in (a) or (b), increase by 2 levels.

Sentencing Guidelines § 3B1.1.

While the reasonable doubt standard may depend upon a legislature's definition of an offense, there are constitutional limits to that power. If the leadership element of Section 848(d) which requires proof beyond a reasonable doubt can become, by some legislative sleight of hand, a

sentencing factor that requires proof by a mere preponderance of the evidence, there is no limit to that power.

The *Mullaney* Court recognized just such an eventuality and warned against limiting the principles of *Winship* to facts that constitute a crime as defined by statute. If that were the law, this Court reasoned, "a State could undermine many of the interests that decision sought to protect without effecting any substantive change in the law. It would only be necessary to redefine the elements that constitute different crimes, characterizing them as factors that bear solely on the extent of punishment." *Mullaney*, 421 U.S. at 699.

C. Sentencing Guideline 3B1.1 Alters the Maximum Penalty for the Crime Committed and Due Process Requires Proof Beyond a Reasonable Doubt

The four-level enhancement created by the guideline and applied by the trial court to obtain Mr. Robinson's offense level alters in fact the maximum penalty for the crime committed. Unlike the Pennsylvania statute which could not be equated to a specific period of incarceration and affected only the minimum sentence, the guideline expands the maximum penalty for the crime committed. Mr. Robinson's offense level - - taking into account the quantities of cocaine allegedly involved and his previous criminal record -- was 36. Thus, the maximum penalty for the crime for which he was charged and convicted was 24 years. But, application of Section 3B1.1 raised his maximum penalty life imprisonment (with a minimum sentence of 30 years) based

upon a fact not established at his trial beyond a reasonable doubt. Under the principles of *Winship* as refined in *McMillan*, that result is not consistent with due process.

CONCLUSION

The Seventh Circuit's rigid rule of automatic relevance of other crimes evidence when specific intent is an element of the charged offense regardless of whether the accused's intent is disputed is in direct conflict with the majority of the other circuit courts of appeal. Uniformity is needed on this recurring issue.

Mr. Robinson received a specific additional sentence that altered the maximum penalty he faced as a result of his conviction based upon a factual finding by a preponderance of the evidence. For the reasons articulated herein, the imposition of this sentence in this manner violated the

guarantees of due process articulated by this Court.

For all these reasons, Mr. Robinson respectfully requests this Honorable Court to grant certiorari to review the judgment and opinion of the Court of Appeals entered in this case.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 89-3680, 89-3687
and 89-3726

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DANIEL W. ROBINSON,
DILLARD E. WOODS, and
PAUL E. ROBINSON,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Illinois.
(No. 88 CR 30021)

Argued October 25, 1990 --
Decided February 27, 1992

Before COFFEY and KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

KANNE, *Circuit Judge*. On May 17, 1989, Daniel W. Robinson, Paul E. Robinson,

and Dillard E. Woods were charged in a four count superseding indictment with conspiracy to distribute and possession with the intent to distribute large quantities of cocaine. Count 1 charged that, from 1980 until May 1988, the appellants, together with Edward E. Alvarez and Serafin Hernandez, conspired to distribute and possessed with the intent to distribute five or more kilograms of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and § 846.[1] Count 2 charged that Paul and Daniel Robinson and others, on or about March 14, 1988, possessed with intent to distribute five kilograms or more of cocaine in violation of § 841(a)(1) and 18 U.S.C. § 2. Count 3 charged that the appellants, on or about April 12, 1988, possessed with intent to distribute 500

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[1] Alvarez and Hernandez were fugitives from justice at the time of trial, but have since been apprehended.

grams or more of cocaine in violation of § 841(a)(1) and 18 U.S.C. § 2. Count 4 charged that on or about March 13-14, 1988, Paul and Daniel Robinson aided and abetted or caused interstate travel to facilitate the unlawful activity in violation of §§ 841(a)(1) and 846, and 18 U.S.C. §§ 1952 and 2.

On June 21, 1989, a jury found Paul and Daniel Robinson guilty on all counts and found Dillard Woods guilty on counts 1 and 3. Pursuant to the Sentencing Guidelines, the district court sentenced Paul to a total of 360 months imprisonment and Daniel to a total of 288 months imprisonment.[2] Woods received 121 months imprisonment. On appeal, the appellants challenge their convictions on numerous

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[2] Both Paul and Daniel Robinson's sentences on counts 2, 3, and 4 are to be served concurrently with their sentences on count 1.

grounds. In the alternative, Paul argues that the district court incorrectly applied the Sentencing Guidelines in sentencing him. We affirm.

I.

In 1972, Paul, with others, was smuggling marijuana from Florida to the St. Louis, Missouri-Southern Illinois area. The operation was not successful until 1974. During the early 1970's, George Yager, who testified for the government at trial, made numerous trips between Florida and St. Louis. Yager transported 200 pound shipments of marijuana to St. Louis and returned to Florida with the proceeds from the sale of those shipments. Another witness for the government, Richard Yackey, also drove shipments from Florida to St. Louis for Paul. Daniel managed the distribution of the marijuana in the St. Louis area, and reported to his brother

Paul, who was in charge of the entire operation.

In the late 1970's, the Robinson organization expanded its activities. In 1977, Yackey was sent by Paul to Colombia to purchase 20,000 pounds of marijuana. In 1979, however, the marijuana distribution operation ended because the organization suffered several financial setbacks, including the loss of a large boat load of marijuana.[3]

In 1978, Paul was convicted of four state felony narcotic offenses in Broward County, Florida and received a twenty-year term of imprisonment. This sentence was later reduced to fifteen years

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[3] The appellants were not charged in the indictment for any of their actions before 1980. The government introduced evidence of the 1972 to 1979 marijuana conspiracy under Rule 404(b) of the Federal Rules of Evidence to show "intent, preparation, plan and knowledge."

imprisonment on appeal.

In late 1979, before he began serving his Florida sentence, Paul contacted Yackey in St. Louis and asked Yackey to help him begin distributing cocaine. Paul wanted to begin selling cocaine to obtain income for his family while he was incarcerated in the Florida penitentiary system. Paul knew that Yackey's contact in St. Louis, Edward Murphy, was willing to purchase cocaine on a regular basis. In the fall of 1979, Murphy came to Florida to purchase a pound of cocaine with Yackey, which had been procured by Paul.

After the sale to Murphy was completed, Yackey explained the operation to Daniel. They decided that Yackey would contact Alvarez to determine if he would supply cocaine directly to the Robinson organization on a regular basis. The organization would in turn deliver the

cocaine to Murphy. Alvarez agreed. After that, Murphy made regular "runs" to Florida to obtain multi-kilogram quantities of cocaine from Alvarez and bring it to St. Louis. Under the arrangement he reached with Yackey, Murphy received 50% of the profits, while the Robinsons and Yackey received the remainder. Murphy was also entirely responsible for financing the operation.

Woods assisted Murphy in "breaking down" the cocaine for sale and would also "stash" cocaine at his apartment in St. Louis. On occasion, Woods would deliver cocaine to Daniel's customers.

After several successful shipments of cocaine to the St. Louis area, Daniel told Yackey to inform Paul of the group's operations. After Yackey informed Paul of the group's activities, Paul and Daniel agreed that Yackey could retain 40 to 50% of

their share of the organization's profits and that the Robinsons would receive the remainder.

In June 1981, Paul began serving his Florida sentence, which he completed in June 1985. While Paul was incarcerated, Daniel received Paul's share of the proceeds of the cocaine smuggling operation. From 1979 until 1984, approximately 110 kilograms of cocaine were purchased from Alvarez and other sources and brought to the St. Louis area for distribution.

In 1984, the Robinson organization distributed significantly less cocaine than in prior years. In January, Alvarez brought up a load of 15 kilograms, which was sold. Shortly thereafter, Yackey distributed the profits to Daniel (which included Paul's share) and to himself. Murphy then departed and the organization ceased operation for a short time. Yackey stated at trial:

"[b]asically it was disbanded, we did nothing anymore. that was the end of it between all of us."

In late 1984, Daniel told Yackey that he was broke and wanted to start dealing cocaine again. Yackey, whose finances were in a similar condition, agreed to join him. Yackey then borrowed money from Murphy and began arranging shipments from Alvarez to the St. Louis area. Daniel told Yackey that he and Yackey would split the profits evenly.

Yager, who was then working at Yackey's restaurant, became the organization's principal runner. He often went to Miami, Florida to receive cocaine shipments from Alvarez and deliver the cocaine to the St. Louis area where it was stored by Woods. Yackey, Daniel, and Yager each had customers who would buy the group's cocaine for resale.

In 1985, Yager was told by Daniel that Yager, Daniel, Paul and Yackey were partners in the cocaine business. During that period, the organization first paid Yager in cash, but eventually paid him in cocaine, while it paid Woods in cash.

In June 1985, Paul was released from the Florida penitentiary system and moved back to St. Louis. Once there, he met with Yackey and demanded his one-third share of all the money made by the organization since late 1984, because, he argued, he had established the supply connection with Alvarez in the 1970's. Yackey then received instructions from Daniel to give Paul a one-third share of all profits which the organization received after it continued operations in late 1984, and to readjust the organization's books accordingly.

The Robinson organization continued to ship cocaine from Florida to

St. Louis from 1985 until April 1988, when Paul and Woods were arrested. Between 1984 and 1988, 100 to 105 kilograms of cocaine were obtained from Alvarez and successfully distributed in the St. Louis area, with the exception of 30.9 kilograms which were seized by Drug Enforcement Administration ("DEA") agents during the investigation of the appellants.

In early 1988, the activities of the Robinson organization became known to drug enforcement agents. In March, Yackey travelled to Florida to meet with Alvarez to arrange the purchase of ten kilograms of cocaine. Yager joined Yackey in Florida with the money for the purchase, which he had received from Daniel. Yackey exchanged funds for five of the ten kilograms purchased with Alvarez, and Yager travelled back to St. Louis with five kilograms of cocaine.

Upon his return to St. Louis, Yager took the five kilograms of cocaine to a storage locker he had secured in Granite City, Illinois. When he arrived at the storage facility, on March 14, 1988, Yager was arrested by drug enforcement agents. After his arrest Yager agreed to co-operate with the government.

On that day, the drug enforcement agents also executed search warrants on the storage space and on a rental vehicle that Yager had parked near the locker. In addition to the five kilograms of cocaine found in the vehicle, the agents also found .25 of a kilogram in the locker. The .25 kilogram quantity was a portion of a fifteen kilogram shipment from Alvarez to St. Louis, in January 1987, that had been given to Yager to sell on consignment.

A few days later, after Yackey had also returned from Florida to the St. Louis

area, Yager arranged to meet with him to give him the five kilograms of cocaine. After Yackey's arrival on March 18, 1988, he was arrested by drug enforcement agents. The agents also seized a handwritten drug ledger from Yackey. Later that day, Yackey agreed to cooperate with the government.

On March 23, 1988, drug enforcement agents requested that Yackey contact Alvarez to set up a purchase of twenty kilograms of cocaine. Yackey contacted Alvarez on several occasions to discuss this transaction. At the request of the drug enforcement agents, who were concerned that the undercover operation might be discovered, Yackey informed Alvarez that the deal would not directly involve either of the Robinsons.

Yackey, at the request of the agents, also placed a camera in his office at his restaurant. On March 31, 1988,

Daniel visited Yackey at his restaurant. Daniel would not talk to Yackey, but instead relied on written messages to inform him "not to talk." Daniel then took Yackey to a lawyer's office in downtown St. Louis, where he determined that Yackey was not wearing a wire. They then returned to Yackey's restaurant where Yackey gave Daniel $4,000 and told him that $2,000 was for him and $2,000 was for Paul.

On April 2, 1988, Paul met with Yackey at a park in St. Louis County. He informed Yackey that he and Daniel had been arguing about how much money that he was spending. Paul told Yackey that Alvarez was "his connection" and that he wanted to split up with his brother Daniel and run the operation himself.

Yackey travelled to Florida on April 8 to complete the purchase of twenty kilograms from Alvarez that he had arranged

shortly after his arrest. After the transaction was completed, Alvarez and Hernandez were arrested.

Paul met with Yackey at his restaurant on April 12, and told him to "come clean" if he had been "busted." Paul told him that "we need to know" because "we can say you were forced to cooperate."

On April 13, 1988, in Granite City, drug enforcement agents executed a search warrant at Woods' residence. The agents seized fifteen ounces of cocaine and took Woods into custody. The Robinsons were arrested shortly thereafter.

II.

The appellants argue that the district court erred in denying their motions for a judgment of acquittal at the close of the government's case because the government proved that they engaged in several conspiracies, not the single ongoing

conspiracy alleged in count 1 of the indictment. They contend that this variance from the indictment was prejudicial and requires us to reverse their convictions. *See United States v. Napue*, 834 F.2d 1311, 1333 (7th Cir. 1987) (if there was a variance between the indictment and the proof, the defendant must demonstrate that it "had a substantial and injurious effect on the case's outcome"). We find that there was no variance.

"Whether there is one conspiracy or many is a question of fact for the jury's determination." *United States v. Molt*, 772 F.2d 366, 369 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081, 106 S.Ct. 1458 (1986). *See also United States v. Tarantino*, 846 F.2d 1384, 1391 (D.C. Cir.), *cert denied*, 488 U.S. 840, 109 S.Ct. 108 (1988), *cert denied*, 488 U.S. 867, 109 S.Ct. 174 (1988) (holding that a "verdict must be upheld if the

evidence adequately supports a finding that a single conspiracy existed."). In *Napue*, we stated that "[s]eparate conspiracies exist when each of the conspirators' agreements has its own end, and each transaction constitutes an end in itself." 834 F.2d at 1332. A single conspiracy exists when "the agreements between the conspirators represent stages or different functions to be performed in the formulation of a larger scheme, the object of which is to effectuate a single unlawful result." *Id.* "A single conspiracy cannot be found, however, when there is no overall goal or common purpose." *United States v. Percival*, 756 F.2d 600, 607 (7th Cir. 1985).

The appellants argue that the evidence proves that there were three separate conspiracies, which occurred between 1980 and 1988. They claim that the first cocaine conspiracy began in 1980 and

ended in 1984. To show that the conspiracy ended, the appellants pointed to Yackey's statement at trial that: "[b]asically it was disbanded. We did nothing anymore. That was the end of it between all of us." The appellants assert that the second cocaine distribution conspiracy began in late 1984 or early 1985 and operated with virtually identical personnel until March 1988, when Yackey and Yager were arrested and began cooperating with the government. They further contend that the third conspiracy began in March 1988 and ended in May 1988, when the twenty kilogram transaction between Yackey, Alvarez and Hernandez was completed. Accordingly, they argue that Paul, Daniel and Woods were not members of this conspiracy because they were not involved in the transaction.

The evidence was more than adequate for the jury to find that there was

a single conspiracy to distribute cocaine from 1980 to 1988. The appellants, together with Yackey and Yager, shared a common purpose to distribute large quantities of cocaine in St. Louis and Southern Illinois. The Robinson organization consistently utilized Alvarez as its source for cocaine throughout the 1980's, and used Murphy to supervise the distribution of the cocaine in the St. Louis area. Moreover, throughout the 1980's, Yager and Yackey transported the cocaine shipments from Florida to St. Louis.

We reject the appellants' argument that Yackey's statement that the cocaine distribution conspiracy was disbanded in 1984 proved that there were at least two conspiracies. Other evidence introduced by the government tended to show only that there was a brief lull in their cocaine distribution during the early months of 1984. *See United States v. Mealy*, 851 F.2d

890, 897 (7th Cir. 1988) (the fact that the defendant was not continuously involved with the other conspirators did not negate a finding of a single conspiracy). Between 1984 and 1985, the appellants' participation in the drug transactions remained largely unchanged. *See United States v. Balistrieri*, 779 F.2d 1191, 1213 (7th Cir. 1985), *cert denied*, 475 U.S. 1095, 106 S.Ct. 1490 (1986) ("[c]continuity of a conspiracy does not require perfect continuity of membership."); *United States v. Stern*, 858 F.2d 1241, 1249 (7th Cir. 1988). The appellants and the other conspirators clearly sought to achieve the same purpose, namely to distribute large amounts of cocaine, from 1985 to 1988 as they had from 1980 to 1984. *See Percival*, 756 F.2d at 607 (to find a single conspiracy the government must show that there was an "overall goal or common purpose").

We also reject the appellants' argument that the arrest of Yackey and Yager terminated the conspiracy. The arrest of a member of a conspiracy does not necessarily terminate the conspiracy as a matter of law, because "the remaining conspirators may continue to carry out the goals of the conspiracy notwithstanding the arrest of one of their partners." *Mealy*, 851 F.2d at 901; *United States v. Papia*, 560 F.2d 827, 835 (7th Cir. 1977). Alvarez continued to carry out the goals of the conspiracy after the arrest of Yager and Yackey. There is no evidence that any of the appellants attempted to withdraw from the conspiracy after the arrest of Yackey and Yager. *United States v. Andrus*, 775 F.2d 825, 850 (7th Cir. 1985). The evidence was sufficient for the jury to find that the appellants were members of one cocaine distribution conspiracy.

A related issue is whether the district court properly admitted into evidence, pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence, statements by Alvarez to Yackey regarding the May 1988 twenty kilogram sale. The appellants argue that because the Robinsons and Woods were not involved in that transaction, the testimony was improperly admitted into evidence. They are incorrect.

Statements by a co-conspirator may be introduced against other conspirators if the government shows that: (1) a conspiracy existed; (2) the defendant and declarant were members thereof; and (3) the offered statement was made during the course of and in furtherance of the conspiracy. *United States v. Hooks*, 848 F.2d 785, 794 (7th Cir. 1988); *United States v. Kaden*, 819 F.2d 813, 818 (7th Cir. 1987); *see also Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775

(1987). We review a district court's findings with respect to these elements for clear error. *Hooks*, 848 F.2d at 794; *Kaden*, 819 F.2d at 819.

We have already concluded that a conspiracy existed, and that the arrest of Yager and Yackey did not terminate it, satisfying the first requirement. The second requirement -- that the defendant and the declarant were members of the conspiracy -- is also satisfied. The third requirement -- that the offered statement was made during the course of and in furtherance of the conspiracy -- was clearly satisfied. Alvarez's statements to Yackey regarding the sale of twenty kilograms of cocaine included discussions of the price, payment terms, and arranging delivery. These statements were in furtherance of the conspiracy. The fact that one party to the conversation, Yackey, was acting at the request of government

agents does not bar admission of a conspirator's statements under Rule 801(d)(2)(E). *Mealy*, 851 F.2d at 901; *United States v. Hamilton*, 689 F.2d at 1262, 1269 (6th Cir. 1982), *cert denied*, 459 U.S. 1117, 103 S.Ct. 753 (1983).

Equally meritless is the appellants' argument that the district court's instructions amended the indictment. Counts 2 and 3 of the indictment charged the appellants (count 2 excluded Woods) with possession of cocaine on different occasions with the intent to distribute, in violation of § 841(a)(1) and 18 U.S.C. § 2. The district court added the words "or aided and abetted another" to the jury instructions relevant to those counts. The appellants argue that the district court thereby amended the indictment. Aiding and abetting need not be alleged in an indictment. *United States v. Galiffa*, 734 F.2d 306, 312

(7th Cir. 1984) (the district court can give an aiding and abetting instruction based upon the evidence if no unfair surprise results). If 18 U.S.C. § 2 is charged in the indictment, the defendant is put on notice that he can be convicted as an aider and abettor. *Id.* Because a violation of 18 U.S.C. § 2 was charged in the indictment, the appellants can neither claim an amendment of the indictment nor unfair surprise.

Paul and Daniel also contest the district court's decision to allow the government to introduce tape and video recordings of conversations between themselves and Yackey, and its decision to allow the jury to read transcripts of those conversations, which were prepared by the government, as the tapes played.

After listening to all of the tapes, with and without transcripts, the

district court found that the tapes were sufficiently audible and trustworthy to be admissible. The district court agreed with the appellants that certain portions of the tapes were inadmissible. The court also held that a transcript of the taped conversations could be supplied to the jury for its use. The appellants and the government were unable to agree on a single transcript, and the appellants decided not to give the jurors their version of the transcripts. The district court found that the government's transcripts were sufficiently accurate to warrant their submission as an aid to the jury.

The appellants next argue that the district court abused its discretion in determining that the tapes were sufficiently audible and trustworthy to be admissible. "'[T]ape recordings which are only partially unintelligible are admissible unless the

unintelligible portions are so substantial as to render the recording as a whole untrustworthy.'" *United States v. Zambrana*, 864 F.2d 494, 498 (7th Cir. 1988)(quoting *United States v. Wilson*, 578 F.2d 67, 69 (5th Cir. 1978)). Our review of the tapes indicates that the tapes were generally audible, with inaudible portions. The inaudibility of a portion of a tape, which is generally audible, is relevant only to its weight, a jury question, not to its admissibility. *United States v. Vega*, 860 F.2d 779, 790-91 (7th Cir. 1988).

The appellants also contend that the district court abused its discretion in allowing the jury to read government transcripts of the conversations as the taped conversations played. It is well settled that the district court has broad discretion "in deciding whether to allow the jury to use written transcripts as aids in

listening to tape recordings." *United States v. Keck*, 773 F.2d 759, 766 (7th Cir. 1985); *Zambrana*, 864 F.2d at 497. The district court followed the procedures we set forth in *Zambrana*, in ordering the parties to prepare a stipulated transcript or to produce alternate versions of the conversations. *See id.* at 498. The appellants declined to prepare their own version of the conversations. After reviewing the tapes and the transcripts, we conclude that the district court did not abuse its discretion in determining that the government transcript was sufficiently accurate to allow its use by the jury.

Paul and Daniel next contend that the district court erred in applying Rule 404(b) when it admitted evidence that Paul and Daniel engaged in a marijuana conspiracy in the 1970's. Woods argues that the evidence of the Robinsons' marijuana

conspiracy prejudiced him. After considering the evidence and the appellants' objections, the district court admitted the evidence to show the Robinsons' "intent, preparation, plan and knowledge."

We review a district court's decision to admit evidence of a defendant's prior crimes for an abuse of discretion. *United States v. Chaimson*, 760 F.2d 798, 808 (7th Cir. 1985). In determining whether evidence of a defendant's other crimes, wrongs, or acts is admissible we apply a four-part test. *United States v. Lennartz*, 948 F.2d 363, 366 (7th Cir. 1991). That evidence may be admitted where:

> (1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue,

> (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

Id. (quoting *United States v. Whalen*, 940 F.2d 1027, 1032 (7th Cir.), *cert. denied*, ____ U.S. _____, 112 S.Ct. 403 (1991)). *See also United States v. Shackleford*, 738 F.2d 776, 779 (7th Cir. 1984).

The evidence of the marijuana conspiracy clearly satisfies the first element of the test. *See Chaimson*, 760 F.2d at 805 (where specific intent is an element of the crime charged, evidence of other acts may be introduced to establish that intent); *United States v. Liefer*, 778 F.2d 1236, 1243 (7th Cir. 1985). The third element of the four-part test is also satisfied. The appellants argue that the second element of

the test is not satisfied because the marijuana conspiracy began long before the cocaine distribution conspiracy. They also contend that the two conspiracies' operations differed significantly, and that the two conspiracies had different members. They note that the marijuana conspiracy, unlike the cocaine conspiracy, imported some of the narcotics directly from Colombia. Moreover, they insist that the marijuana conspiracy also included several conspirators who were not involved in the cocaine conspiracy.

Contrary to appellants' contentions, we conclude that the second element of the test is satisfied. The marijuana conspiracy was, in fact, quite similar to the cocaine distribution conspiracy. Paul was the leader of both conspiracies and was assisted throughout by Daniel, who played a major role in

distribution in the St. Louis area. The conspiracies both distributed illegal narcotics purchased from sources in Florida and both principally utilized Yager and Yackey as "runners." Although the marijuana conspiracy began long before the cocaine distribution conspiracy, the later conspiracy commenced shortly after the marijuana conspiracy was terminated. *See Liefer*, 778 F.2d at 1252 (finding that evidence of a prior conspiracy was not too remote because it ended shortly before a second conspiracy began). The evidence demonstrated that Paul used the organizational framework developed during the marijuana conspiracy to initiate the cocaine conspiracy.

The fourth element of the four-part test is whether "the probative value of the evidence is . . . substantially outweighed by the danger of unfair

prejudice." *Lennartz*, 948 F.2d at 366; *Jackson v. United States*, 886 F.2d 838, 847 (7th Cir. 1989). The probative value of the evidence of the marijuana distribution conspiracy to show intent, motive, and opportunity is strong because it demonstrated that the Paul and Daniel utilized essentially the same organization to distribute cocaine. The unfairly prejudicial impact of the evidence, although not negligible, was limited because the district court instructed the jury that it could not consider the evidence of the marijuana conspiracy as evidence of the appellant's guilt.

Our decision in *Liefer* is instructive here. 778 F.2d at 1252. In *Liefer*, we upheld the admission of evidence of the defendant's membership in an uncharged drug conspiracy. In that case, one conspirator testified that the charged

conspiracy grew out of his contacts from a prior conspiracy. The defendant was a member of both conspiracies. *Id.* We upheld the admission of the co-conspirator's testimony "as background on how the conspiracy developed, and to show the [defendant]'s intent and plan to resume operating as a middleman for [the testifying conspirator]." *Id.* Accordingly, we hold that the district court did not abuse its discretion in admitting evidence that the appellants had conspired to distribute marijuana in the 1970's.

Even if we were convinced that the evidence did not meet the requirements for admissibility under Rule 404(b), we would be required to affirm the appellants' convictions because the evidence of their guilt was overwhelming, and thus, any error was harmless. *See United States v. Williams*, 951 F.2d 853, 858 (7th Cir. 1992).

Paul raises an additional Rule 404(b) challenge to his convictions. He argues that the district court erred in allowing the government to introduce evidence of his prior imprisonment as a result of his Florida conviction. At trial, Yackey testified that Paul told him, in 1980 or 1981, that he wanted to begin distributing cocaine because he needed to "support his family and keep things going" while he was in prison. The government introduced evidence of Paul's Florida imprisonment to explain his motive, intent, opportunity and plan, in setting up the cocaine distribution operation. The jury was not informed of the criminal conduct underlying the imprisonment.

Paul argues that this evidence does not meet the four-part test for the admissibility of Rule 404(b) evidence. Daniel and Woods argue that Yackey's

testimony also prejudiced them as well. We conclude that the testimony met the four-part test under Rule 404(b). The testimony clearly met the first and third elements of the test. *See Lennartz*, 948 F.2d at 366. The evidence was highly relevant to the conspiracy charge because it explained why Paul began distributing cocaine, thus satisfying the second part of the test. The chance that the evidence would unfairly prejudice Paul was sufficiently reduced because the government did not introduce evidence of the conduct underlying the sentence of imprisonment. Thus, the fourth element of the test was satisfied. *See id.*

This case is unlike *United States v. Falco*, 727 F.2d 659, 663 (7th Cir. 1984) where the government properly introduced the defendant's prior theft convictions to show that the defendant knew that goods he possessed were stolen. Here, the jury was

aware only that, in 1980 or 1981, Paul had been convicted and would soon after serve a prison sentence. The evidence was introduced only to show why he began the cocaine distribution conspiracy. Paul's prior imprisonment was not introduced to show that he had a propensity for committing drug related offenses.

The appellants contend that the district court abused its discretion in refusing to allow the appellants to cross examine Yager and Yackey about their past drug use. They also contend that the district court's rulings violated their rights under the confrontation clause. During voir dire examination out of the jury's presence, Yackey and Yager each admitted to extensive past drug use. As to Yager, the district court prohibited cross-examination about past drug use, finding that the appellants had not shown that "the

use of drugs to the extent that [Yager] has testified has affected his truthfulness or his ability to remember or testify truthfully as to that memory." As to Yackey, the district court allowed the appellants to show during cross-examination that he had suffered blackouts and memory loss from the use of alcohol, and that he had used alcohol in combination with cocaine.

The district court has broad discretion in limiting the cross-examination of a witness. *United States v. Herrera-Medina*, 853 F.2d 564, 566 (7th Cir. 1988); *United States v. Robinson*, 832 F.2d 366, 373 (7th Cir. 1987), *cert denied*, 486 U.S. 1010, 108 S.Ct. 1739 (1988). In *United States v. Cameron*, we held that the district court may admit evidence concerning a witness' own past drug use insofar as it relates to his "'possible inability to recollect and

relate." 814 F.2d 403, 405 (7th Cir. 1987) (quoting *United States v. Banks*, 520 F.2d 627, 631 (7th Cir. 1975)); *Jarrett v. United States*, 822 F.2d 1438, 1445 (7th Cir. 1987). Therefore, the district court need only allow cross-examination concerning a witness' past drug use if the witness' memory or mental capacity are "legitimately at issue." *Cameron*, 814 F.2d at 405. We also noted, in *Cameron*, that "evidence that a witness has used illegal drugs may so prejudice the jury that it will excessively discount the witness' testimony." *Id.*; FED.R.EVID. 403. The district court may bar cross-examination about a witness' illegal drug use when it is used "for the sole purpose of making a general character attack." *Cameron*, 814 F.2d at 405.

The appellants contend that the district court should have allowed them to inquire into past drug use to impeach the

character and credibility of Yackey and Yager, and to show that they were more involved in the Robinson organization then they admitted. The appellants, in sum, insist that witnesses who have previously used narcotics are more likely to tell lies. This is exactly the type of character attack that *Cameron* and *Jarrett* forbid.

The appellants cannot show that the district court unfairly limited cross-examination. As to Yackey, the appellants' objection that cross-examination was unfairly limited is meritless because the district court allowed the appellants to demonstrate that drug and alcohol use had caused memory loss. As to Yager, the district court did not abuse its discretion in limiting cross-examination because, in voir dire, the appellants did not establish that Yager's drug use had affected his memory of relevant events. The appellants'

confrontation clause argument is similarly without merit. *See United States v. Diaz*, 876 F.2d 1344, 1349 (7th Cir. 1989); *United States ex rel. Ashford v. Director, Ill. Dept. of Corr.*, 871 F.2d 680, 685 (7th Cir. 1989).

Paul argues that the district court erroneously denied his motion for a mistrial after, he contends, a government witness, Agent Michael Braun, made an unconstitutional comment upon his post-*Miranda* silence. *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240 (1976). A review of the record demonstrates that this argument is without merit.

After Agent Braun arrested Paul, and read him a *Miranda* warning, Paul made two statements. First, Paul said "[t]he only thing I talked to him [Yackey] about over the phone or in his office the last couple days is about a restaurant I want him

to help me with in Manchester." Yackey was present when the arrest took place. Agent Braun responded that the investigation had been going on for several weeks and that Yackey was cooperating. At trial, Agent Braun stated that: "[Paul] dropped his head and said, 'Oh forget it.'"

It is readily apparent from this conversation that Agent Braun did not comment upon Paul's silence in violation of the due process clause. In *Doyle*, the court held that "the use for impeachment purposes of petitioner's silence, at the time of arrest and after *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Id.* at 619, 2245. After he received a *Miranda* warning, Paul voluntarily waived his constitutional right to remain silent. We hold that the government made no comment upon his silence.

The district court also properly

increased, by four levels, Paul's offense level as an organizer or leader of the conspiracy, pursuant to Sentencing Guideline § 3B1.1(a). *See* United States Sentencing Commission, *Guidelines Manual*, § 3B1.1(a) (1991). We review the district court's factual finding that Paul was an organizer or leader of criminal activity for clear error. *United States v. Rosengard*, 949 F.2d 905, 908 (7th Cir. 1991); *United States v. Hintzman*, 937 F.2d 1196, 1199 (7th Cir. 1991); *United States v. Herrera*, 878 F.2d 997, 1000 (7th Cir. 1989). The record evidence was sufficient for the district court to find that Paul was leader of the cocaine distribution conspiracy. Paul initiated the conspiracy, obtained its source of supply, and retained a leadership role throughout its existence. *United States v. Thompson*, 944 F.2d 1331, 1348-49 (7th Cir. 1991) (the defendant located

cocaine sources, recruited couriers, and profited significantly from the activities of the conspiracy); *United States v. Cooper*, 942 F.2d 1200, 1209 (7th Cir. 1991).

III.

The other arguments raised by the appellants are without merit.

We AFFIRM the convictions and sentence of Paul Robinson and the convictions of Daniel Robinson and Dillard Woods.

A true Copy:

Teste:

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Clerk of the United States
Court of Appeals
for the Seventh Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

Nos. 89-3680, 89-3687
and 89-3726

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL W. ROBINSON,
DILLARD E. WOODS, and
PAUL E. ROBINSON,

Defendants-Appellants.

ORDER

(April 24, 1992)

Before JOHN L. COFFEY, Circuit Judge, MICHAEL S. KANNE, Circuit Judge, and JESSE E. ESCHBACH, Senior Circuit Judge

On consideration of the petitions for rehearing with suggestion for rehearing en banc filed in the above entitled cause, no judge in active service requested a vote

thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS HEREBY ORDERED that the aforesaid petitions for rehearing be, and the same are hereby, DENIED.

A True Copy:

Teste:

_____

Clerk of the United States
Court of Appeals for the
Seventh Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAUL E. ROBINSON,
DANIEL W. ROBINSON,
EDWARD E. ALVAREZ,
SERAFIN HERNANDEZ and
DILLARD E. WOODS,

Defendants.

CRIMINAL NO. 88-30021

Title 21
Sections 841(a)(1) and 846

Title 18
Sections 1952 and 2
United States Code

THE GRAND JURY CHARGES:

COUNT 1

That from in or about 1981, and continuously thereafter, up to and including the date of this indictment, in Madison and St. Clair Counties, in the Southern District of Illinois, and in divers

other Districts,

PAUL E. ROBINSON,

DANIEL W. ROBINSON,

EDWARD E. ALVAREZ,

SERAFIN HERNANDEZ and

DILLARD E. WOODS,

defendants herein, did knowingly combine, conspire, confederate and agree together, with each other, and with divers other persons both known and unknown to the Grand Jury, to knowingly and intentionally distribute, and possess with intent to distribute, divers quantities of cocaine, a Schedule II Narcotic Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1);

WAYS AND MEANS

1. It was a part of the conspiracy that PAUL E. ROBINSON, DANIEL W. ROBINSON, and others, would finance the purchase of large, multi-kilogram amounts,

of cocaine on a regular basis.

2. It was a further part of the conspiracy that various persons would make regular trips, or "runs", to south Florida, and other places, to produce cocaine, from EDWARD E. ALVAREZ, and SERAFIN HERNANDEZ, and other persons, and return to the St. Louis Metropolitan area in both the Southern District of Illinois and Eastern District of Missouri.

3. It was a further part of the conspiracy that once the cocaine was in the St. Louis Metropolitan area it would be kept in large amounts at various "stash house" locations in both the Southern District of Illinois and Eastern District of Missouri where it would be broken down into small quantities for resale by various large and small dealers, and others.

4. It was a further part of the conspiracy that in excess of approximately

125 kilograms (275 pounds) of cocaine would be distributed and caused to be distributed in the St. Louis Metropolitan area by ALL DEFENDANTS during the course of the conspiracy.

; all in violation of Title 21, United States Code, Section 846.

COUNT 2

That on or about March 14, 1988, in Madison County, in the Southern District of Illinois,

PAUL E. ROBINSON,

DANIEL W. ROBINSON,

EDWARD E. ALVAREZ,

SERAFIN HERNANDEZ,

defendants herein, and others, did knowingly and intentionally possess with intent to distribute and cause to be distributed, approximately 5.25 kilograms (11.5 pounds) of cocaine, a Schedule II Narcotic Controlled Substance; all in violation of

Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 3

That on or about April 12, 1988, Madison County, in the Southern District of Illinois,

PAUL E. ROBINSON,

DANIEL W. ROBINSON,

DILLARD E. WOODS,

defendants herein, and others, did knowingly and intentionally possess with intent to distribute approximately 651 grams (1.43 pounds) of cocaine, a Schedule II Narcotic Controlled Substance; all in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT 4

That on or about March 13-14, 1988, in Madison and St. Clair Counties, in

the Southern District of Illinois, and elsewhere,

PAUL E. ROBINSON,

DANIEL W. ROBINSON,

EDWARD E. ALVAREZ,

SERAFIN HERNANDEZ,

defendants herein, and others, unlawfully, willfully and knowingly did travel in interstate commerce, and did aid and abet and cause travel in interstate commerce, from the State of Florida to the State of Illinois with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, said unlawful activity being a business enterprise involving the distribution of cocaine, a Schedule II Narcotic Controlled Substance in violation of Title 21, United States Code, Section 841(a)(1); and, thereafter did perform and cause to be

performed acts facilitating said unlawful activity of distribution of cocaine; all in violation of Title 18, United States Code, Sections 1952 and 2.

A TRUE BILL

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FOREPERSON A True Copy

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UNITED STATES ATTORNEY

Recommended Bond: Detention as to all defendants

Supreme Court, U.S.
FILED
NOV 16 1992
OFFICE OF THE CLERK

No. 92-184

In the Supreme Court of the United States

OCTOBER TERM, 1992

PAUL E. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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QUESTIONS PRESENTED

1. Whether the district court erred, in petitioner's trial for conspiracy to distribute cocaine, by admitting evidence of his participation in a prior conspiracy to distribute marijuana.

2. Whether the district court erred in applying the preponderance-of-the-evidence standard when it found that petitioner was an organizer or leader of a criminal activity for purposes of Sentencing Guidelines § 3B1.1.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-184

PAUL E. ROBINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 956 F.2d 1388.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1992. A petition for rehearing was denied on April 24, 1992 (Pet. App. 45a-46a). The petition for a writ of certiorari was filed on July 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted of conspiracy to distribute, and to possess with intent to distribute, in excess of five kilograms of cocaine (Count 1); possession of cocaine with intent to distribute it (Counts 2 and 3); and traveling in interstate commerce to carry on an illegal business enterprise (Count 4). He was sentenced to concurrent terms of imprisonment of 360 months for Count 1, 240 months for Count 2, 120 months for Count 3, and 60 months for Count 4, to be followed by ten years of supervised release. C.A. App. 179-181. The court of appeals affirmed.

1. The evidence at trial showed that from 1972 until 1978, petitioner directed a marijuana distribution ring that transported marijuana in 200-pound shipments from Florida to eastern Missouri and southern Illinois. In the early 1970s, George Yager and Richard Yackey transported shipments of marijuana from Florida to St. Louis and returned to Florida with the proceeds of those shipments. Petitioner's brother, Daniel Robinson, managed the distribution of the marijuana in St. Louis, and petitioner was in charge of the entire operation. The organization expanded its activities in the late 1970s, with petitioner sending Yackey to purchase 20,000 pounds of marijuana in Colombia in a single transaction. The marijuana operation ended in 1979 because of financial setbacks, including the loss of a large boat-load of marijuana. Pet. App. 4a-5a; Gov't C.A. Br. 2-3.

In 1978, petitioner was convicted in a Florida county court of four state felony offenses and was sentenced to a term of imprisonment. Before he began serving that sentence, petitioner asked Yackey to help him begin dis-

tributing cocaine, so that petitioner could generate income for his family during his incarceration. In the fall of 1979, Yackey brought Edward Murphy to Florida to purchase cocaine that petitioner had procured. Pet. App. 5a-6a; Gov't C.A. Br. 3.

Some ten months later, Murphy contacted Yackey and indicated an interest in purchasing more cocaine. Yackey, in turn, contacted Daniel Robinson, who instructed Yackey to make the purchase from a Florida supplier named Edward Alvarez. Yackey and Murphy purchased a kilogram of cocaine from Alvarez and transported it from Florida to St. Louis, where it was sold by Murphy, Yackey, and Daniel Robinson. The profits were divided among Murphy, Yackey, Daniel Robinson, and petitioner. Similar transactions were repeated throughout the early 1980s. Pet. App. 6a-7a; Gov't C.A. Br. 3-4.

Petitioner began serving his Florida sentence in June, 1981, and instructed Yackey to pay his share of the cocaine proceeds to Daniel Robinson. In 1984, George Yager resumed the role of courier that he played in the earlier marijuana conspiracy, and began making runs from Florida to St. Louis with cocaine. In all, the organization transported approximately 110 kilograms of cocaine from Florida to St. Louis between 1979 and 1984. Pet. App. 6a-9a; Gov't C.A. Br. 4.

The organization ceased operation for a short time in 1984, when Murphy withdrew. Before the end of that year, however, Daniel Robinson and Yackey decided to resume the operation and borrowed money from Murphy to make their first purchase. Although Daniel and Yackey agreed to split the profits evenly, Daniel later reminded Yackey that petitioner was their partner. Yager again acted as the organization's chief courier and made frequent trips to Florida to get cocaine from Al-

varez for distribution in the St. Louis area. Pet. App. 8a-10a; Gov't C.A. Br. 4-5.

In June 1985, petitioner was released from a Florida penitentiary and moved to St. Louis. Once there, he met with Yackey and demanded a third of all the money made by the organization since the resumption of operations in late 1984. He argued that he was entitled to that share for having established the supply connection with Alvarez in the late 1970s. With Daniel Robinson's agreement, Yackey acceded to petitioner's demand and adjusted the organization's records to reflect that allocation of the profits. Pet. App. 10a; Gov't C.A. Br. 5.

The organization continued shipping cocaine until 1988. On March 14 of that year, Yager was arrested by Drug Enforcement Administration (DEA) agents at a storage facility in Granite City, Illinois, where he had taken five kilograms of cocaine. Yager agreed to cooperate with the authorities, and he arranged a meeting at which he would deliver the cocaine to Yackey, who was returning from Florida a few days later. Yackey was arrested upon his arrival on March 18, and a handwritten drug ledger was seized. Yackey also agreed to cooperate. Pet. App. 12a-13a; Gov't C.A. Br. 7.

On March 31, 1988, Daniel Robinson came to Yackey's office and, communicating only in writing, informed Yackey that he thought there might be a problem and that Yackey should come with him. They proceeded to a lawyer's office in downtown St. Louis, where Daniel determined that Yackey was not wearing an electronic surveillance device. They then returned to Yackey's restaurant, where Yackey gave Daniel $4000 and said that half was for him and half was for petitioner. Pet. App. 13a-14a; Gov't C.A. Br. 8.

Meeting at a park on April 2, 1988, petitioner and Yackey discussed the future of the operation. Petitioner said Alvarez was his connection and that he wanted to exclude his brother, Daniel Robinson, from the operation. On April 12, petitioner again met with Yackey and told him to "come clean." Petitioner said that Yackey should admit if he had been caught. If Yackey had cooperated with the authorities, petitioner told him, "we can say you were forced to cooperate." On April 13, DEA agents seized 15 ounces of cocaine from one of the conspirators. Petitioner was arrested shortly thereafter. Pet. App. 14a-15a; Gov't C.A. Br. 9-10.

2. In a pretrial motion and in a motion for new trial, petitioner objected to the admission of evidence concerning the marijuana conspiracy that preceded his organization's involvement with cocaine, arguing that it was inadmissible evidence of uncharged misconduct under Fed. R. Evid. 404(b). The district court held the evidence admissible, finding that it "was not offered to show the defendants' propensity to commit crimes * * *, but was rather evidence of a common plan and design as well as motive, opportunity, preparation and knowledge." C. A. App. 152-153. Reasoning that the government should be permitted to introduce evidence of similar misconduct to prove the commission of a specific-intent crime, the court observed that the prior marijuana conspiracy "bore a 'singular[ly] strong resemblance to the pattern of the offense[s] charged.'" C.A. App. 154, quoting *United States* v. *Jones*, 438 F.2d 461, 466 (7th Cir. 1971). The court therefore found that the probative value of the evidence outweighed its prejudicial effect (C.A. App. 152) and permitted its introduction. The court gave a limiting instruction regarding the marijuana conspiracy, instructing the jury that the evidence was to be considered

only for the limited purpose of showing intent, preparation, plan, and knowledge. See C.A. App. 153.

3. Following a recommendation set forth in petitioner's presentence investigation report, the district court increased his offense level by four levels because he had acted as an organizer or leader of a criminal activity with five or more participants. See Sentencing Guidelines § 3B1.1. With that adjustment, petitioner's offense level was 40, and his Guidelines sentencing range was 360 months' to life imprisonment. The district court imposed a sentence of 360 months' imprisonment. C.A. App. 180.

4. The court of appeals affirmed. Rejecting petitioner's argument that evidence of his prior marijuana conspiracy should not have been admitted, the court found that petitioner "used the organizational framework developed during the marijuana conspiracy to initiate the cocaine conspiracy" (Pet. App. 32a), and explained that the uncharged conspiracy was relevant for background and to show an intent and plan to resume the earlier operation (Pet. App. 33a-34a).[1] The court also approved the adjustment of petitioner's base offense level to reflect his role as an organizer or leader of a criminal

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[1] The court specifically found that "[t]he probative value of the marijuana distribution conspiracy to show intent, motive, and opportunity is strong because it demonstrated that [petitioner and his brother] utilized essentially the same organization to distribute cocaine." Pet. App. 33a. The court noted that petitioner was the leader of both conspiracies and was assisted by his brother throughout; that both conspiracies involved distribution of illegal narcotics purchased from sources in Florida; that both conspiracies employed the same principal "runners"; and that the cocaine conspiracy commenced shortly after the marijuana conspiracy was terminated. Pet. App. 32a.

activity. The court noted that petitioner had initiated the conspiracy, located a source of cocaine, and retained a leadership role throughout the conspiracy's existence. Pet. App. 43a.

ARGUMENT

1. Petitioner renews his argument (Pet. 10-20) that the district court erred in admitting evidence that he organized a conspiracy to distribute marijuana prior to the cocaine conspiracy for which he was charged in this case.

As this Court explained in *Huddleston* v. *United States*, 485 U.S. 681 (1988), Rule 404(b) of the Federal Rules of Evidence requires exclusion of evidence of prior crimes only "when [it] is offered solely to prove character." 485 U.S. at 687. Hence, the dispositive inquiry when such evidence is offered is simply "whether that evidence is probative of a material issue other than character," *id.* at 686; if so, the evidence is "subject only to general strictures limiting admissibility such as Rules 402 and 403." *Id.* at 688.[2]

When a conspiracy is charged, evidence of a closely related preexisting relationship among the conspirators is relevant and admissible to show motive and intent, to explain the relationship among the conspirators, and to give the jury a complete picture of how the conspiracy

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[2] Petitioner's assertion (Pet. 14-15) that *Huddleston* supports his claim is mistaken. This Court concluded in *Huddleston*, based on a review of the legislative history, that "Congress was not nearly so concerned with the potential prejudicial effect of Rule 404(b) evidence as it was with ensuring that restrictions would not be placed on the admission of such evidence." 485 U.S. at 688-689.

came about.[3] Those issues were clearly in dispute for two reasons. First, petitioner took no action to relieve the government of its burden of proving every element of conspiracy. Second, petitioner's defense at trial was to acknowledge association with the other conspirators, but to suggest that the association was innocent. Petitioner's wife testified that she and petitioner had only a social relationship with Yackey, whose only business-related transaction with petitioner and his wife was to help them select a location for their restaurant and get it started. Gov't C.A. Br. 10. Petitioner's counsel raised the issues of intent and the background of the conspiracy in his closing argument, by emphasizing that the acceptance of money from a conspirator does not, without more, make the recipient a conspirator (C.A. App. 725) and by asserting that petitioner "had nothing to do with" contacts among the other conspirators that initiated their involvement with cocaine (C.A. App. 724). Moreover, important parts of the government's evidence that petitioner participated in the conspiracy, including his insistence on receiving a full share of the proceeds for all of the cocaine transactions because he introduced the other conspirators to their main supplier, would have been difficult for jurors to understand if they had not been informed that the cocaine conspiracy grew out of the earlier conspiracy to distribute marijuana.

Petitioner argues that review is warranted to resolve a conflict among the circuits on whether evidence of un-

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[3] *United States* v. *Jones*, 933 F.2d 1541, 1545-1546 (11th Cir. 1991); *United States* v. *Penson*, 896 F.2d 1087, 1093 (7th Cir. 1990); *United States* v. *Paulino*, 935 F.2d 739, 752 (6th Cir. 1991), cert. denied, 112 S. Ct. 883 (1992); *United States* v. *Harris*, 932 F.2d 1529, 1533-1534 (5th Cir.), cert. denied, 112 S. Ct. 270 (1991).

charged conduct is admissible whenever intent is an element of the charged offense, or only if that element is "actually in dispute." Pet. 11-12. Whatever conflict may exist on that issue, this case is not an appropriate vehicle for its resolution. As explained above, petitioner's organization of the earlier marijuana conspiracy was probative of the nature of his relationship with other conspirators, an issue petitioner's evidence and arguments placed in dispute.[4] Thus, the issue on which petitioner seeks review is not presented by the facts of his case.

2. Petitioner also contends (Pet. 20-35) that the district court erred in adjusting his offense level for purposes of sentencing based on its finding, by a preponderance of the evidence, that he was an organizer or leader of a criminal activity that involved five or more partici-

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[4] None of the cases on which petitioner relies, *United States* v. *Manafzadeh*, 592 F.2d 81 (2d Cir. 1979); *United States* v. *O'Connor*, 580 F.2d 38 (2d Cir. 1978); *United States* v. *Beechum*, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979); and *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975), involved evidence of an uncharged conspiracy from which the charged conspiracy grew, or a claim by an alleged conspirator that his association with the others was innocent.

Moreover, even "those circuits that follow [the Second Circuit's] approach uniformly require that the defendant affirmatively take intent out of the case, generally by stipulation or concession." *United States* v. *Manner*, 887 F.2d 317, 322 n.2 (D.C. Cir. 1989), cert. denied, 493 U.S. 1062 (1990). Here, petitioner did no such thing. As discussed above, petitioner's defense at trial and his counsel's argument to the jury put intent squarely at issue. Indeed, petitioner acknowledged before trial that "his specific intent to commit the offenses charged [was] a 'matter in issue.'" Mem. in Support of Defendant Paul E. Robinson's Motion in Limine 3-4 (filed May 25, 1989).

pants. Petitioner argues that due process requires that his role as an organizer be proved beyond a reasonable doubt, because it resulted in imposition of a more severe sentence than the Sentencing Guidelines would otherwise have authorized.

This Court rejected a nearly identical claim in *McMillan* v. *Pennsylvania*, 477 U.S. 79 (1986). There, the defendant challenged a statute mandating a minimum five-year sentence if the sentencing judge found, by a preponderance of the evidence, that the defendant "visibly possessed a firearm" (*id.* at 81) during the commission of the offense of conviction. The Court explained that, as a general rule, the reasonable doubt standard applies only to the factual findings necessary to convict the defendant of a crime; because visible possession of a firearm was not an element of the offense for which the defendant was convicted, the State was not required to prove it beyond a reasonable doubt. *Id.* at 84-86. Although a severe minimum sentence was mandatory if the trial court found visible possession, the Court rejected the argument that due process required application of a heightened standard of proof. *Id.* at 91. Noting that "[s]entencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all," the Court found "nothing in Pennsylvania's scheme that would warrant constitutionalizing burdens of proof at sentencing." *Id.* at 91-92.

As in *McMillan*, nothing in the Sentencing Reform Act of 1984 or the Sentencing Guidelines requires departure from the settled principle that due process permits a sentence to be based on facts established by a preponderance of the evidence. Accordingly, the courts of appeals have held that use of the preponderance standard

for findings under the Guidelines ordinarily satisfies the requirements of due process.[5]

Petitioner attempts to distinguish *McMillan* by asserting that Section 3B1.1 of the Sentencing Guidelines "is derived from [the] statutorily created crime" of conducting a continuing criminal enterprise (Pet. 29), and that by making one of the elements of that crime a basis for sentencing enhancement, the Guidelines evade the requirements of due process through "legislative sleight of hand" (Pet. 31-32). Although this Court cautioned in *Mullaney* v. *Wilbur*, 421 U.S. 684, 699 (1975), that a State would not be permitted to undermine the requirement that crimes be proved beyond a reasonable doubt by redefining their elements as sentencing factors, the Court explained in *McMillan* that that admonition is not implicated simply because a statute calling for an enhanced penalty shares some element in common with a separate statutory offense. Noting that the Pennsylvania statute at issue in *McMillan* "did not change the definition of any existing offense," the Court approved the use of a particular factor in sentencing, even though the

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[5] See *United States* v. *Sklar*, 920 F.2d 107, 110 (1st Cir. 1990); *United States* v. *Guerra*, 888 F.2d 247, 251 (2d Cir. 1989), cert. denied, 494 U.S. 1090 (1990); *United States* v. *McDowell*, 888 F.2d 285, 290-291 (3d Cir. 1989); *United States* v. *Urrego-Linares*, 879 F.2d 1234, 1237-1238 (4th Cir.), cert. denied, 493 U.S. 943 (1989); *United States* v. *Silverman*, 889 F.2d 1531, 1535 (6th Cir. 1989); *United States* v. *White*, 888 F.2d 490, 499 (7th Cir. 1989); *United States* v. *Gooden*, 892 F.2d 725, 727-728 (8th Cir. 1989), cert. denied, 496 U.S. 908 (1990); *United States* v. *Restrepo*, 946 F.2d 654 (9th Cir. 1991), cert. denied, 112 S. Ct. 1564 (1992); *United States* v. *Saucedo*, 950 F.2d 1508 (10th Cir. 1991); *United States* v. *Cross*, 916 F.2d 622, 623 (11th Cir. 1990), cert. denied, 111 S. Ct. 1331 (1991); *United States* v. *Salmon*, 948 F.2d 776, 778-779 (D.C. Cir. 1991).

same factor might, in combination with other elements, constitute a separate crime. 477 U.S. at 89-90.

The same is true of Section 3B1.1. In defining the weight to be accorded the defendant's role as an organizer of criminal activity, Congress did not reduce the proof necessary to establish the offense of conducting a continuing criminal enterprise. The elements of that offense, set forth in 21 U.S.C. 848(c) (the CCE statute), remain the same, and differ substantially from the facts that a court must find to increase a defendant's base offense level under Section 3B1.1. To convict under the CCE statute, the government must prove not only that the defendant supervised others, but also that he committed a "continuing series" of drug violations, and that he obtained substantial income from those activities. Section 3B1.1 is not concerned with continuity of violations or the amount of income derived therefrom; it focuses only on the defendant's role as an organizer or leader. Moreover, while conviction under the CCE statute carries a mandatory minimum sentence of 20 years' imprisonment, application of Section 3B1.1 merely adds 2-4 "offense levels" to the defendant's crime of conviction, which in this case resulted in a sentence less than six years longer than the maximum of the range that otherwise would have been prescribed under the Guidelines. Thus, contrary to petitioner's suggestion, Section 3B1.1 does not create a means for applying a lesser standard to punish the defendant for conducting a continuing criminal enterprise.

Nor does Section 3B1.1 alter the maximum penalty for the crime of conspiring to distribute cocaine, as petitioner asserts (Pet. 33-34). In 21 U.S.C. 841 (1988 & Supp. III 1991) and 846, Congress established life imprisonment as the maximum penalty for petitioner's crime.

Like the Pennsylvania statute in *McMillan*, Section 3B1.1 "neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty," 477 U.S. at 87-88; it simply guides the district court in the selection of the appropriate sentence within the range prescribed by statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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